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SUPREME COURT, U. S.

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NO. 911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

J. E. DAVANT AND KATHRYN DAVANT, ET AL.,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

MOTION OF PETITIONERS FOR LEAVE TO FILE A PETITION FOR REHEARING OF ORDER DENYING THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this court denying the petition for writ of certiorari in this case, entered on April 24, 1967. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decisions of the Tax Court of the United States in *Estate of Bernard H. Stauffer v. Commissioner*, Docket Nos. 4561-63-4563-63, 48 T.C. No. 29, filed

June 14, 1967, and *Associated Machine (Formerly Associated Machine Shop) v. Commissioner*, Docket No. 5177-65, 48 T.C. No. 32, filed June 15, 1967, are in direct conflict with that of the Court of Appeals for the Fifth Circuit in this case in reference to the meaning and application of section 368(a)(1)(F) of the Internal Revenue Code and in those cases the Tax Court has expressly rejected the holding of the Court of Appeals for the Fifth Circuit in this case as to said section 368(a)(1)(F), which conflict should be resolved by this Court. Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time, and the Court clearly has the power, in its discretion, to entertain the petition for rehearing. *Boudoin v. Lykes Brothers Steamship Co., Inc.*, 348 U.S. 336; *Cahill v. New York, New Haven, & Hartford Railroad Co.*, 351 U.S. 183; *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, (October 18, 1965) in which this Court said at 382 U.S. 26-27:

> "On June 11, 1962, we denied certiorari. 370 U.S. 918. On October 8, 1962, we denied a petiton for rehearing. 371 U.S. 856. We are now apprised, however, of 'intervening circumstances of substantial . . . effect,' justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.' *United States v. Ohio Power Co.*, 353 U.S. 98, 99."

See also *United States v. Ohio Power Co.*, 353 U.S. 98, where this Court said at 353 U.S. 99:

> "We have consistently ruled that the interest in finality of litigation must yield where the interests of

justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases. *Clark v. Manufacturers Trust Co.*, 337 U.S. 953; *Goldbaum v. United States*, 347 U.S. 1007; *Banks v. United States*, 347 U.S. 1007; *McFee v. United States*, 347 U.S. 1007; *Remmer v. United States*, 348 U.S. 904; *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413; *Boudoin v. Lykes Bros. S.S. Co.*, 350 U.S. 811; *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183; *Achilli v. United States*, 352 U.S. 1023."

The Tax Court has not entered any final judgment in these cases and they are still pending in that Court.

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